

In the Supreme Court of the State of Alaska

John Doe,

Appellant,

v.

**State of Alaska, Department of Public
Safety,**

Appellee.

Supreme Court No. **S-16748**

Order

Granting Reconsideration and
Directing Allocation of Fees

Date of Order: **8/15/2019**

Trial Court Case No. **3AN-16-05027CI**

Before: Bolger, Chief Justice, Stowers, Maassen, and Carney, Justices, and
Matthews, Senior Justice.*

1. The court has before it Doe's motion for full court reconsideration of the individual justice order of 6/14/19 that provided that each party would bear its own attorney's fees.

2. Under Appellate Rule 508(e) attorney fees are not to be awarded unless provided by statute. AS 09.60.010(c)(1) provides for an award of full reasonable fees to a claimant who has prevailed in asserting a constitutional right. Subsection (d) (1) limits the award to fees for services that were devoted to the establishment of the particular constitutional right in question, and (d)(2) provides that the award may only be made "if the claimant did not have sufficient economic incentive to bring the suit, regardless of the constitutional claims involved."

3. The requirements of AS 09.60.010(c) and (d) for an award of attorney fees are satisfied in this case.

(a) *Doe prevailed in establishing a constitutional right.*

* Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

Alaska Statute 09.60.010(c)(1) requires that a claimant prevail on a constitutional claim in order to be eligible for fees for litigating that claim.¹ “[T]he prevailing party ‘is the one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention.’ ”² While determination of prevailing party status at the trial level lies within the broad discretion of the trial court,³ it necessarily falls to this court to determine which party prevailed on appeal.⁴ Doe argues that he is the prevailing party because he “successfully prosecuted this appeal, obtaining a ruling from this [c]ourt that [ASORA] denies due process” as well as a remedy — an avenue for registrants to challenge their status. The State counters that it “also prevailed on important matters in this case” because this court ruled in its favor on the jurisdictional question and because the State’s “articulated legitimate public safety concerns informed the [c]ourt’s analysis and the decision.”

A party may be considered the prevailing party despite not prevailing on all issues in a case.⁵ Nor need a party have obtained all the relief sought in order to have

¹ AS 09.60.010(c)(1).

² *State, Dep’t of Corr. v. Anthoney*, 229 P.3d 164, 167 (Alaska 2010) (quoting *K & K Recycling, Inc. v. Alaska Gold Co.*, 80 P.3d 702, 721 (Alaska 2003)).

³ *K & K Recycling, Inc.*, 80 P.3d at 721.

⁴ *See Se. Alaska Conservation Council v. State*, 211 P.3d 1146, 1147 (Alaska 2009) (determining that appellant was prevailing party on appeal because it successfully argued “the constitutional challenge [that] was the sole claim in [its] appeal”); *cf.* Alaska R. App. P. 508(c) (providing for award of costs to appellant or petitioner if superior court’s decision is reversed, and providing that in case of partial reversal “court will determine which party, if any, shall be allowed costs”).

⁵ *Meidinger v. Koniag, Inc.*, 31 P.3d 77, 88 (Alaska 2001).

prevailed.⁶ In this case Doe sought a determination that ASORA violated due process; this court held that it did.⁷ This court reasoned, as Doe argued on appeal, that ASORA implicated fundamental constitutional rights, that strict scrutiny should apply, and that ASORA was not sufficiently narrowly tailored.⁸ And although this court did not invalidate ASORA, it did provide a remedy for the due process violation, requiring that ASORA registrants be afforded a hearing to evaluate any continuing need to register.⁹ Doe therefore prevailed on the “main issue” of whether ASORA violated the Alaska Constitution’s due process protections. Neither his failure to prevail on the jurisdictional question nor this court’s conclusion that ASORA serves compelling public safety interests alters the fact that Doe asserted a constitutional due process claim and obtained a favorable decision on that claim.¹⁰

Furthermore, AS 09.60.010 contemplates — in fact, mandates — separating successfully argued constitutional claims from other claims: it provides that awards of attorney’s fees and costs shall be limited to “claims concerning [constitutional rights] upon which the claimant ultimately prevailed.”¹¹ This court may therefore properly award attorney’s fees for work conducted on the due process arguments but not for work

⁶ *Andrus v. Lena*, 975 P.2d 54, 58 (Alaska 1999).

⁷ *Doe v. State, Dep’t of Pub. Safety*, ___ P.3d ___, Op. No. 7375 at 34-38, 2019 WL 2480282, at *15-16 (Alaska June 14, 2019).

⁸ *Id.* at 17-38, *8-16.

⁹ *Id.* at 38-42, *16-17.

¹⁰ *See id.* at 7-13, *5-6 (holding that Alaska has jurisdiction to require out-of-state offenders to register), 30-32, *13 (holding that ASORA furthers compelling interest of protecting public).

¹¹ AS 09.60.010(d)(1).

conducted on the jurisdictional argument.

(b) *Doe lacked sufficient economic incentive to bring the suit, regardless of the constitutional claims.*

Alaska Statute 09.60.010(d)(2) requires for an award of attorney’s fees that the prevailing constitutional claimant must have lacked sufficient economic incentive to pursue the action, constitutional claims aside.¹² This court’s economic incentive inquiry focuses on the primary purpose of the lawsuit; a claim “brought primarily to advance the litigant’s direct economic interest, regardless of the nature of the claim,” does not entitle the prevailing party to attorney’s fees.¹³ Two factors are relevant to this inquiry: “the nature of the claim and relief sought and the direct economic interest at stake.”¹⁴

Both factors weigh in Doe’s favor. First, “[t]he nature of the claim and the type of relief requested” — equitable or legal — “are strong indicators of primary purpose.”¹⁵ This court looks to the rationale for the lawsuit as articulated in the pleadings, as well as to the type of relief sought and the amount in controversy to assess economic incentive.¹⁶ But “‘[e]conomic interest need not take the form of damages,’ and requesting injunctive relief does not guarantee a lack of economic motivation”;

¹² AS 09.60.010(d)(2).

¹³ *Alaska Conservation Found. v. Pebble Ltd. P’ship*, 350 P.3d 273, 281-82 (Alaska 2015) (applying economic incentive analysis from common-law public interest litigant doctrine to AS 09.60.010 because legislature had “adopted [this court’s] language from the fourth prong of the public interest litigant test”).

¹⁴ *Id.* at 282.

¹⁵ *Id.*

¹⁶ *Id.*

rather, the inquiry is specific to the facts of the case.¹⁷ Here, Doe sought only equitable relief: preliminary and permanent injunctions enjoining the enforcement of ASORA against him and declaratory judgments that ASORA violated his due process rights and that Alaska lacked jurisdiction to apply it to him. He did not seek monetary damages.

Second, while Doe had an economic stake in the invalidation or non-enforcement of ASORA, his interest was not the kind of direct interest that this court has found to establish “sufficient economic incentive” to bring a lawsuit in previous cases. Where the outcome of a case directly impacted a constitutional claimant’s livelihood such that the claimant was “primarily motivated to litigate by concerns for his own economic livelihood,” this court determined that a direct economic interest existed.¹⁸ But where economic benefits from litigation are indirect or attenuated, accrue only incidentally, or depend on factors independent of the litigation, this court has consistently held the economic incentive insufficient to preclude application of AS 09.60.010’s fees provisions.¹⁹ Doe has admitted that being required to register as a sex offender has

¹⁷ *Id.* (quoting *Matanuska-Susitna Borough Sch. Dist. v. State*, 931 P.2d 391, 403 (Alaska 1997)).

¹⁸ *Shepherd v. State, Dep’t of Fish & Game*, 897 P.2d 33, 45 (Alaska 1995) (holding that big game hunter who challenged regulations’ preference for subsistence hunters in certain areas was not public interest litigant because much of his business involved guiding hunters in area at issue, giving him direct economic stake in litigation).

¹⁹ *See, e.g., Ninilchik Traditional Council v. Noah*, 928 P.2d 1206, 1219 (Alaska 1996) (holding that plaintiffs bringing procedural and substantive challenge to oil and gas lease sale were public interest litigants despite some plaintiffs being fishing trade organizations because primary interests at stake were public rights, not private economic interests); *Kodiak Seafood Processors Ass’n v. State, Dep’t of Fish & Game*, 900 P.2d 1191, 1198-99 (Alaska 1995) (holding that fishing trade association’s economic interest in preventing scallop dredging in area closed to fishing was indirect because association would only benefit if administrative agency later decided to reopen area to crab fishing).

adverse economic effects, limiting his employment options. But he mainly asserted non-economic interests in privacy and freedom from government intrusion. He will benefit economically from this court's decision only if a court later determines that he is no longer dangerous and need not continue to re-register.²⁰ And even if this court had completely invalidated ASORA, as he sought, the economic benefits he might have obtained would have depended on his applying for higher-paying employment and obtaining it based on no longer having the designation of "registered sex offender" attached to his name. This is not the kind of direct stake that establishes a primarily economic incentive for litigation.²¹ Doe, therefore, satisfies the absence of economic incentive requirement and thus qualifies as a prevailing constitutional claimant under AS 09.10.060(c).

4. Doe has not yet presented, as required by AS 09.60.010(d)(1), a basis

²⁰ See *Doe v. State, Dep't of Pub. Safety*, ___ P.3d ___, Op. No. 7375 at 38-42, 2019 WL 2480282, at *16-17 (Alaska June 14, 2019) (remanding for superior court to fashion hearing to evaluate offender's dangerousness and necessity of continued enforcement of ASORA).

²¹ The Superior Court also recognized that Doe lacked sufficient economic incentive to bring this suit:

While Plaintiff has a significant private incentive in bringing this case that interest is not an "economic incentive" as that term is defined in *Alaska Conservation Foundation v. Pebble Ltd. Partnership* 350 P.3d 273 (Alaska 2015). Such an economic interest must be direct, rather than indirect or attenuated. *Id.* at 253. While Mr. Doe might have indirectly benefitted economically had the requirement that he register as a sex offender been struck down, that was not the primary motivation for bringing the lawsuit.

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for allocating fees between the legal services devoted to the due process issue on which he prevailed and those devoted to the jurisdictional issue, on which he did not prevail.

Accordingly, it is **ORDERED** as follows:

1. The motion for full court reconsideration is **GRANTED**.
2. Doe will be awarded full reasonable fees, but only for legal services devoted to establishing the due process right on which he prevailed.
3. Within 10 days after service of this order Doe shall submit a memorandum, records, and affidavits indicating how the allocation required by this order should be accomplished.
4. The State may file a memorandum in opposition to the allocation proposed by Doe within 7 days after service of Doe's submission.

Issued at the direction of the court.

Clerk of the Appellate Courts

Meredith Montgomery

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